ORIGINAL

# FEDERAL MARITIME COMMISSION

| PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC. FOR RULEMAKING | Petition No. P10-03 |
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Served: January 22, 2004

## ORDER

On December 19, 2003, the Commission received a petition for rulemaking ("Petition") from the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA" or "Petitioner"). Notice of the filing of the Petition was served by the Commission on December 22, 2003. Interested persons were given until January 12, 2004, to submit their comments in response to the Petition. 68 Fed. Reg. 74961 (December 29, 2003). For the reasons set forth below, we grant the Petition in part and deny it in part, as discussed below and as reflected in a Notice of Proposed Rulemaking ("NPR") to be issued shortly.

## I. POSITION OF THE PETITIONER

NCBFAA asserts that it is the primary trade association representing licensed ocean transportation intermediaries ("OTIs") in the U.S. and that its members are linked to 90% of the U.S. oceanbome cargo. Petition at 2. NCBFAA contends that the U.S-Chinese Agreement on Maritime Transport and associated Memorandum of Consultations, signed December 8, 2003, provides that the Chinese government will not require U.S. NVOCCs to make a cash deposit in a Chinese bar& as long as the NVOCC: (1) is a legal person registered by U.S. authorities; (2) obtains an FMC license as an NVOCC; and (3) provides evidence of financial responsibility in the total amount of RMB 800,000 or U.S. $96,000. Petition at 4 (citing Memorandum of Consultations at 2.). NCBFAA suggests, therefore, that an NVOCC licensed and bonded in accordance with the Commission's regulations that voluntarilyincreases the amount of its suretybond by $21,000 and provides a bond, which by its conditions is responsive to potential claims of the Chinese Ministry of Communications ("MOC") (as well as other Chinese agencies) for violations of the RIMT, would be able to register in the PRC without paying a cash deposit otherwise required by Chinese law and regulation. Petition at 4.

Because current FMC regulations, however, do not provide any mechanism for NVOCCs to furnish a bond amount greater than the base $75,000 required under 46 C.F.R. § 515.21(a)(2) (other than for branch offices), NCBFAA asserts that it appears necessaryfor the Commission to amend its regulations in order to permit licensed NVOCCs to file an additional bond. Petition at 4-5. Therefore, NCBFAA proposes that the Commission amend its regulations to permit NVOCCs to modifytheir FMC bonds by obtaining "riders" that add an additional $21,000 of bond amount, available to payanyfines and penalties that might be imposed by Chinese authorities pursuant to the RIMT. Petition at 5. Specifically, NCBFAA requests that the Commission amend its regulations as follows:

1. $515.21 - - Add a new subsection (5) to provide that a licensed NVOCC could voluntarily obtain a bond Rider in the amount of $21,000.

2. §515.22(b) - - Add a sentence providing that the Rider would provide coverage for damages, reparations or penalties

arising from any transportation-related activities under the Shipping Act and the RIMT.

3. $515.22(d)(4) and (d)(5) - - Make similar changes to these sections which relate to participation by licensed NVOCCs in group surety bonds.

4. $515.23(a) - - Amend this section to provide that such a Rider to the surety bond is to be available to pay reparations or penalties imposed by MOC.

5. §5 15.23(b) - - Amend this section in order to reference the possibility of a party filing a complaint with MOC that could relate to such Rider

6. Appendix - - Add the following rider:

RIDER

The undersigned ], as Principal and[__________], as Surety do herebyagree that the existing Bond No. []to the United States of America and filed with the Federal Maritime Commission pursuant to Section 19 of the Shipping Act of 1984 is modified as follows:

1. The following condition is added to this Bond:

An additional condition of this Bond is that $ [ ]shall be available to pay any fines and penalties imposed by the Ministry of Communications or its authorized competent communications department of the people's government of the province, autonomous region or municipality directly under the Central Government or the State Administration of Industry and Commerce pursuant to the Regulations of the People's Republic of China on International Maritime Transportation and the Implementing Rules of the Regulations of the PRC on International Maritime Transportation promulgated by MOC

Decree No. 1, January 20, 2003. Such amount is separate and distinct from the bond amount set forth in the first paragraph of this Bond. Payment under this Rider shall not reduce the bond amount in the first paragraph of this Bond.

2. The liability of the Surety shall not be discharged by any payment or succession of payments pursuant to section 1 of this Rider, unless and until the payment or payments shall aggregate the amount set forth in section 1 of this Rider. In no event shall the Surety's obligation under this Rider exceed the amount set forth in section 1 regardless of the number of claims.

3. This Rider is effective the[____]dayof[________], 200[_], and shall continue in effect until discharged, terminated as herein provided, or upon termination of the Bond in accordance with the sixth paragraph of the Bond. The Principal or the Suretymay at any time terminate this Rider by written notice to the Federal Maritime Commission at its office in Washington, DC. The Surety also shall send notice to the Ministry of Communications of the People's Republic of China via telecopier or email. Evidence of transmission of the notice to the Ministry of Communications shall constitute proof of notice. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission, or transmission of the notice to the Ministry of Communications, whichever occurs later. The Surety shall not be liable for fines or penalties imposed on the Principal after the expiration of the 30-day period but such termination shall not affect the liabilityof the Principal and Surety for any fine or penalty imposed prior to the date when said termination becomes effective.

4. Bond No.[_______] remains in full force and effect according to its terms except as modified above.

In witness whereof we have hereunto set our hands and seals on this [____]day of[________], 200[_],

[Principal]
By:

[Surety]
By:

Petition at 5-6.

## II. SUMMARY OF THE COMMENTS

The Commission received one comment in response to the Petition from the American Surety Association ("ASA"). ASA states that it takes no position in support of or against the Petition. ASA at 4. ASA has several comments and questions, however, should the Commission determine to grant the Petition and undertake a rulemaking proceeding. ASA at 4-5. ASA's questions concern: the amount of the proposed rider; whetherthe rider will cover all Chinese ocean trade lanes; the exact amount available to pay a Chinese penalty; the type and language in which notice be given to sureties; whetherthe Commission's rulemaking will amend all forms of financial responsibility, where claims against the rider will be made; and procedure for service of process and transparency for violations under the Chinese regulations. Finally, ASA states that it reserves the right to make full and complete comments should the Commission grant the Petition. ASA at 6.

## III. DISCUSSION

It appears that there is good reason for the Commission to initiate a rulemaking to determine how it may amend its rules to provide NVOCCs with the opportunity to obtain additional evidence of financial responsibility, which would enable those entities to meet more easilythe requirements of Chinese law. In general, the form of relief requested appears to be reasonable. The Commission believes that the proposed rule will largely achieve the outcome NCBFAA desires.

However, the specific rule changes proposed by NCBFAA are not entirely consistent with the Commission's rules. Therefore, while the Commission grants NCBFAA's Petition in most substantive respects, we decline to propose several specific changes requested by NCBFAA and propose others which differ in form from those requested by NCBFAA.

The draft rule the Commission proposes differs from that requested by NCBFAA in its Petition in the following specific respects. First, there is some inconsistencyin the relief requested by NCBFAA in its Petition and that reflected in the rider it proposes. In its Petition, NCBFAA requests a rule which would "provide that the bond would. . . be available for the payment of fines or reparation awards." However, NCBFAA's rider speaks only of "fines and penalties." Therefore we are proposing a rule which would relate only to "fines and penalties" imposed by MOC. Nevertheless, comments on this issue are invited in response to the NPR

Similarly, although NCBFAA requests the Commission to amend its rules at 46 C.F.R. § 515.21 to provide for the optional rider, we believe such a proposal is more properly placed in the Commission's rules at section 515.25. It also appears that NCBFAA has mis-identified section 515.22(b) as the appropriate section to be amended, because that section relates only to financial responsibilityevidenced byinsurance. Petition at 5. We believe the more appropriate place for the language requested is also section 515.25.

With respect to NCBFAA's suggestions regarding the group suretybonds, we believe the addition of section 515.25(c), the changes we propose to section 515.21(b), and the addition of Appendix F will sufficiently provide for these optional riders to be provided by group surety bonds. Therefore, no changes to section 515.22(d)(4) or (5) are proposed.

Finally, we note that NCBFAA requests that the Commission propose changes to section 515.23 (a) which appear to have the effect of creating a procedure by which the Commission would administer the payment of claims against these optional riders. The Commission declines to propose such changes because it would be inappropriate for the Commission to be involved in the collection of claims arising from decisions of MOC, whether involving reparations or fines or penalties. The NPR proposes a new section 515.23(d) reflecting this determination. The issuers of such bonds may wish to propose language to be included in the optional rider itself which would relate to procedures by which claims maybe exercised against the optional rider, such as whether the English language must be used for all claims, whether the surety will not pay any claim earlier than 30 days after it has been notified of the claim, or what documentation the suretywill require before paying a claim. The Commission invites comments on this issue.

As the NPR imposes no new burdens, but is expected to benefit the entities represented by NCBFAA, and as the request for rulemaking has not been opposed, the Commission will grant the Petition in part, as described above. The Commission also notes its preference that these provisions stand apart from its rules establishing financial responsibility requirements under the Shipping Act, so that these rule changes could later be removed if the Chinese government no longer requires such proof of security or has made other provisions in its regulations for such proof.

## CONCLUSION

We agree with Petitioner that there are good reasons for the Commission to initiate a rulemaking proceeding to explore whether it should amend its rules to allow for optional additional bonding for NVOCCs.

THEREFORE, IT IS ORDERED That the Petition is granted in part and denied in part.

By the Commission.

Bryant L. VanBrakle
Secretary